90-1325

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES
October Term 1990

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**B. K. AGNIHOTRI, Aaron HARRIS and SOUTHERN UNIVERSITY LAW CENTER,**
Petitioners

*versus*

**Kenneth J. ARENSON,**
Respondent

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

Petition for Writ of Certiorari

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Judge, in granting under Rule 50(b) a motion for judgment n.o.v., though not owed the deference due in fundamental fact-finding under Rule 52(a), is yet entitled to some analogous respect such that:

> to reverse him when he has held "no evidence" supports material elements of plaintiff's case, the Court of Appeals ought ordinarily to recite some such evidence; and
>
> to reverse him on the ground that he failed to consider "all the evidence," the Court of Appeals ought ordinarily point to something more than a scintilla on relevant elements.

II. Whether, in reversing a judgment n.o.v. that reasoned there was "no evidence" of pretext-hidden racial discrimination by individual defendant Chancellor Agnihotri, the Court of Appeals disregards Texas Dept. of Community Affairs v. Burdine, and imposes on defendants rather than plaintiff the burden of persuasion, by dismissing, as "little evidence from which the jury could infer that legitimate reasons existed," both:

> a U.S. District Court action by the discharged president of the university that ordered defendant law school to re-hire him in his former tenured law professorship; and
>
> the law school's decision to try to improve its low Bar-passing rate by dedicating a tenure-track law professorship to legal writing (a post respondent stipulated he would not have accepted), instead of having it taught only by the non-faculty member director of alumni affairs (*sic*).

III. Whether a jury finding "that plaintiff's race was a significant factor in [individual] defendant Professor Harris's actions concerning the decision to disapprove plaintiff's" employment request supports a judgment against Harris, when Harris had only one vote on a five-member committee and respondent presented "no evidence" that any other member shared or was influenced by Harris's racial balance views.

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## REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is Arenson v. Southern University Law Center, 911 F.2d 1124 (and Appendix p. A-1). That of the Middle District of Louisiana is unreported but is set forth at App. A-7.

## STATEMENT OF JURISDICTIONAL GROUNDS

The grounds on which this Court's jurisdiction is invoked in this employment discrimination case are that the Court of Appeals' opinion and judgment of September 19, 1990, rehearing denied November 21, fail to accord to the District Judge appropriate recognition of his responsibility to render judgment n.o.v. under Rule 50(b); conflict with this Court's McDonnell-Burdine[1] line of decisions; and construe 42 U.S.C §§ 1981 and 1983 to make an individual employee (*sic*) liable, because of his racial balance views, for a non-racial decision by others not to employ respondent. This Court's jurisdiction is invoked by authority of 28 U.S.C. § 1254(1).

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[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

## CONSTITUTION AND STATUTES INVOLVED

### United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### 42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

### 42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the parties injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this Section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### 42 U.S.C. § 2000e-2. Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**Federal Rules Civil Procedure, R. 50(b)**

**(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

## STATEMENT OF THE CASE

### *Factual*

This is an employment discrimination case. Respondent, a white 1978 law graduate and 1981 bar admittee, wrote 20 or more law schools for job interviews at the December 1984 national hiring meeting for law schools. Petitioner Southern University Law Center (SULC), formerly all black by "law" but now having a "slim majority" black faculty and an Indian chancellor (and a 40% white student body), alone gave him an interview. It hired him as a visiting assistant professor for the 1985 Spring semester, and in March 1985 and again in 1986 it extended his visit through 1985-86 and then 1986-87.

In June 1985 one regular SULC professor's employment was terminated, and by September 1985 the 1985-86 contract of another specified it was his last. But in September 1985, U.S. District Court action forced SULC to re-hire in his former tenured law professorship the recently-fired university president; and before February 1986 (it was then interviewing), SULC had decided its poor Bar-passing rate required it to have legal writing taught no longer by its non-faculty director of alumni affairs but by a law professor with a permanent faculty position (one that respondent stipulated he would not have accepted).

In Fall 1985 respondent expressed to petitioner Chancellor Agnihotri dissatisfaction with his status of visitor, and on February 14, 1986 wrote petitioner Professor Harris (a black), head of a faculty committee, asking for appointment to a permanent, "tenure-track" faculty position.[2] In April 1986, respondent testified, he asked Chancellor Agnihotri for a tenure-

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[2] Permanent or regular faculty, although meanwhile terminable without cause on a year's notice, acquire tenure after seven years and are then dischargeable only for cause. Visiting faculty merely visit for a specified time.

track position and was told there was none available; one would have to be created for him and there were budgetary difficulties including a threatened 20% reduction (in February 1986 documents noted by the Court of Appeals, although in fact new taxes spared the universities). There were intervening communications (including some with faculty members that respondent secretly tape-recorded). On September 29, 1986, in reply to respondent's 13-day earlier letter (there was intervening correspondence) that asked an answer before the December 1986 national hiring meeting of law schools, Chancellor Agnihotri wrote respondent that the appointments committee had met that day and denied his request to be changed from visiting professor to tenure-track professor (and added, though he had said he could not remain in visitor status, that his visiting assistant professorship would not be again extended). That committee denied tenure-track on Chancellor Agnihotri's advice that there were then no tenure-track positions open.

Professor Harris was also a member of that committee, and there is evidence that he had expressed the view that SULC should maintain a racial balance on the faculty, and had too many white professors already. There is no similar evidence as to any other member of the committee.

***Procedural***

Charging racial employment discrimination, respondent sued SULC and Chancellor Agnihotri and Professor Harris in the Middle District of Louisiana, under 42 U.S.C. §§ 1981 and 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (the basis of the District Court's jurisdiction). Notwithstanding a jury's special verdict that "race was a significant factor in the actions of [the individuals] concerning" respondent's employment request, Chief District Judge Parker entered judgment for defendants on all claims.

The District Judge reasoned that respondent did not prove that SULC had a vacancy for which respondent applied, noting that the two tenure-track vacancies that had occurred during

respondent's stay at SULC were filled by the return of the president and the upgrading of legal writing (with a permanent professorship that respondent stipulated he would not accept). Alternatively, the District Judge treated those two events as legitimate non-racial explanations of why respondent was not hired, and reasoned that respondent did not prove them pretext to hide racism on the part of the chancellor. The Judge declared the record "completely devoid of any evidence ... that Chancellor Agnihotri, a native of India, was motivated by racial concerns ...." The Judge reasoned as to Professor Harris, in substance, that whatever his racial views, there was "no evidence" he denied employment to respondent, not by his single vote, and not by conspiracy with nor by influencing others.

The Court of Appeals, in an opinion by Judge Gee joined by Judges Thornberry and Smith, reversed. It reasoned, essentially, that the jury could have found that tenure-track positions were available, and "the defendants do not contend that the plaintiff was denied tenure [*sic*] for a legitimate reason."

Petitioners sought but were denied rehearing and now seek certiorari. 28 U.S.C. § 1254(1).

## ARGUMENT

### I.

Whether the District Judge, in granting under Rule 50(b) a motion for judgment n.o.v., though not owed the deference due in fundamental fact-finding under Rule 52(a), is yet entitled to some analogous respect such that:

> to reverse him when he has held "no evidence" supports material elements of plaintiff's case, the Court of Appeals ought ordinarily to recite some such evidence; and
>
> to reverse him on the ground that he failed to consider "all the evidence," the Court of Appeals ought ordinarily point to something more than a scintilla on relevant elements.

The Court of Appeals' ignoring the District Judge's core reasons for his judgment n.o.v. is a departure from the accepted and usual course of judicial proceedings and proper appellate judicial administration (including its didactic function).

The District Judge reasoned that there was no tenure-track job vacancy when plaintiff applied for one; but if two earlier vacancies must be considered, there were legitimate, non-racial motives for having assigned them as SULC did (one to the fired university president re-hired by U.S. court order and one to the newly-created strong legal writing program replacing the sideline run by the director of alumni affairs). Those non-racial reasons were not shown pretext: "The record is completely devoid of any evidence ... that Chancellor Agnihotri, a native of India, was motivated by racial concerns ...."

The division of labor between trial and appellate courts recognizes in each a natural primacy in its functions. At its strongest, the District Court can only be reversed in its findings of fact if clearly erroneous. Fed. Rules Civ. Proc. R. 52(a).

This Court has emphasized this principle in cases such as Amadeo v. Zant, 486 U.S. 214 (1988); and in discrimination cases such as Anderson v. Bessemer City, 470 U.S. 564 (1985), and Pullman-Standard v. Swint, 456 U.S. 273 (1982). Courts have in other contexts recognized this role-primacy, and the need to let District Judges have reasonable discretion to operate, if they are to perform their functions rather than, reversal-shy, abstain, as in, e.g., summary judgment (see Washington Post Company v. Keogh, 365 F.2d 965, 967, 125 U.S.App.D.C. 32 (1966), cert. denied 385 U.S. 1011). District Judges may become loath to grant judgments notwithstanding the verdict and those judgments' contribution to the efficient administration of justice under the Rules of Civil Procedure may be left unmade, if a Court of Appeal may reverse without responding to a District Judge's "no evidence" finding, or with the charge that the District Judge failed to consider "all the evidence" while itself ignoring the overwhelming bulk and citing a scintilla.[3]

The District Judge held, as to the first individual defendant, that the record was "completely devoid of any evidence ... that Chancellor Agnihotri, a native of India, was motivated by racial concerns ...." Racial motives thus were not shown to be his purpose in telling the faculty committee that (after the return of the fired president and the hiring of the legal writing professor) there were no tenure-track vacancies. Respondent did not show that it was pretext by Agnihotri to deem the only vacancies filled (both before respondent ever wrote to apply for a tenure-track position), one by the return by court order

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[3] For example, the Court of Appeals cites "student testimony [by *four* students] ... that plaintiff was an 'excellent teacher.'" It then asserts "The defendants make no serious effort to rebut this ...." (911 F.2d at 1127, n. 3). Yet plaintiff admitted on cross-examination (T-146), and SULC's computer print-out (P-31) shows, very low evaluations of him by *two hundred five* students (in attitude toward students, interest-motivating, and teaching effectiveness). Compare the test for reversing a trier of fact's judgment: "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

of a former professor meanwhile president, and the other by the school's decision to initiate a strong legal writing program.

Similarly the District Judge held, as to defendant black Professor Harris, that "there was no evidence," "a total failure of proof," that his racial balance views influenced or were shared by other members of the faculty committee that denied respondent's request for a job--that Harris denied him employment by conspiring with or controlling the other committee members. Yet that denial is essential to plaintiff's case--unless (the First Amendment notwithstanding) expressing racial balance views imposes civil liability on one who causes no injury.

Proper appellate judicial administration (including its didactic function) obliges a Court of Appeals to answer a District Judge's "no evidence" finding if it reverses--and if it expects that District Judge to continue to render Rule 50(b) judgments n.o.v. whenever he or she concludes one warranted. To answer is more than an instructive courtesy to the District Judge: it is the reasoned justification to the litigants of the reversal. It is the accepted and usual course of appellate judicial proceedings that manifests allegiance to the Rule of Law.

II.

Whether, in reversing a judgment n.o.v. that reasoned there was "no evidence" of pretext-hidden racial discrimination by individual defendant Chancellor Agnihotri, the Court of Appeals disregards Texas Dept. of Community Affairs v. Burdine, and imposes on defendants rather than plaintiff the burden of persuasion, by dismissing, as "little evidence from which the jury could infer that legitimate reasons existed," both:

a U.S. District Court action by the discharged president of the university that ordered defendant law school to rehire him in his former tenured law professorship; and

the law school's decision to try to improve its low Bar-passing rate by dedicating a tenure-track law professorship

> to legal writing (a post respondent stipulated he would not have accepted), instead of having it taught only by the non-faculty-member director of alumni affairs (*sic*).

In view of the U.S. Court-ordered re-hiring of the fired university president in his former tenured law professorship, and the start-up of a serious legal writing program run by a law professor to solve a serious Bar-exam problem, it is hard to fathom the Fifth Circuit's saying "the defendants do not contend that the plaintiff was denied tenure for a legitimate reason."[4]

Respondent was of course not denied *tenure*, but the creation of a "tenure-track" *job* so he could have one; and defendants (who owed him none) of course do contend that he was denied such a job for legitimate, non-racial reasons.

Those reasons included that, at SULC (and presumably elsewhere), a "tenure-track" job is not a mere title. (If it be, where is respondent's injury?) Unlike the visiting professor who (SULC thought) is invited for a semester or a year at a time, the tenure-track professor at SULC is entitled to a full year's notice, meaning a full extra year's salary is committed, before termination save for cause. Accordingly there *are* budgetary considerations in creating additional tenure-track positions. The faculty committee acknowledged by its actions that it could appoint only to existing tenure-track positions.

Only two tenure-track job vacancies had occurred during

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[4] *Query*, whether respondent even showed a prima facie case. "An employer's isolated decision to reject an applicant who belongs to a racial minority does not show that the rejection was racially based. Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." Teamsters v. United States, 431 U.S. 324, 358, n. 44 (1977). There was no vacancy by the time respondent first wrote (although he had expressed desire earlier), and SULC has changed over recent years from an all black faculty to one black by only a slim majority, and with an Indian chancellor.

respondent's visit to the school, and both had been preempted before respondent wrote his first letter in February 1986 asking for a tenure-track job. The first was filled by the court-ordered return of the university president to his former law professorship; the second by a decision to have a permanent law professor teach legal writing (instead of the director of alumni affairs) because SULC graduates had a very poor rate of passing the Bar exam.[5] (Respondent stipulated at trial that he would not have accepted the labor-intensive, less-lofty, and lower-paying legal writing professorship.)

Perhaps, as in Furnco Construction Corporation v. Waters, 438 U.S. 567, 576 (1978), "the Court of Appeals went awry ... in apparently equating a prima facie showing under McDonnell Douglas with an ultimate finding of fact as to discriminatory refusal to hire ...." The Court of Appeals here appears to conclude that two others' getting them proved the availability of tenure-track jobs. But it ignores whether the circumstances discharged SULC's burden of *production* of legitimate, non-racial reasons those two got the jobs and respondent did not.

U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 714 (1983), asserts that, once a case is fully tried, "addressing the question whether [plaintiff] made out a prima facie case"

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[5] Academic freedom of course does not insulate racial discrimination in employment or otherwise. See University of California Regents v. Bakke, 438 U.S. 265 (1978). Yet there are special considerations, including academic freedom and the specific role-primacy of the academicians, in reviewing decisions by academicians that have a significant academic component. See Board of Curators Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Sweezy v. State of New Hampshire, 354 U.S. 234 (1957). Furnco Construction Corporation v. Waters, 438 U.S. 567, 576-577 (1978), is analogously instructive: "The Court of Appeals ... thought ... hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider ... the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII." Similarly, neither Title VII nor §§ 1981 et seq. deny SULC the freedom to use its available means to teach its academically-disadvantaged students according to its rational academic judgment.

may distract from "the ultimate question of discrimination vel non." Perhaps that happened here. Whatever happened, it seems that, as the majority found in Board of Trustees v. Sweeney, 439 U.S. 24 (1978), there remains misunderstanding of the operation of McDonnell Douglas's sample prima facie case and then Burdine's burden only of production upon defendant, with burden of persuasion remaining upon plaintiff.

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 986 (1988), notes again that a plaintiff in a disparate treatment case "is required to prove that the defendant had a discriminatory intent or motive." Under Burdine's scheme of shifting evidentiary burdens,

> a prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a job or promotion, continued to seek applicants with qualifications similar to the plaintiff's.... [T]he employer in turn may rebut it simply by producing some evidence that it had legitimate, non-discriminatory reasons for the decision. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination....

Watson, 487 U.S. at 986.

Whether one analyze the former Southern president's return and the upgrading of legal writing to professor-taught as having filled the only two vacancies before respondent applied, or as being the "legitimate explanation" of why respondent was not hired in either of them, they do not bespeak racial discrimination. They bespeak the power of the Courts, and the sanity of a law school's shepherding its resources to better prepare its graduates to pass the Bar exam: and the right of a job-seeker to refuse a job he does not want. The Court of Appeals, however, did not even consider whether respondent proved SULC's use of its only two tenure-track vacancies was pretext, because the Court of Appeals did not even consider whether

that evidence satisfied the Burdine burden of *production*.[6]

## III.

> Whether a jury finding "that plaintiff's race was a significant factor in [individual] defendant Professor Harris's actions concerning the decision to disapprove plaintiff's" employment request supports a judgment against Harris, when Harris had only one vote on a five-member committee and respondent presented "no evidence" that any other member shared or was influenced by Harris's racial balance views.

42 U.S.C. § 1981 assures all persons equal rights under the law, and § 1983 declares:

> Every person who ... subjects ... any ... person to the deprivation of any rights ... shall be liable to the parties injured ....

*If* Professor Harris rejected respondent for his white race but the four other committee members rejected him on other grounds (as they did the seven previous rejectees, all black), did Harris deprive him of any right or cause him any injury? Do §§ 1981 and 1983 make Harris owe him the job that was not Harris's to give, or its pay?

The effect of the Court of Appeals reversal of the District Judge is to penalize Professor Harris's mere expression of his racial balance views. Conceded, one may not lawfully deny

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[6] The Court of Appeals errs also in dismissing Louisiana's profound and commonly-known recession in its oil-based economy, which provoked the February 1986 directions from the State Board of Regents "to reduce the budgets of all higher education institutions by" 20%. That the Legislature rescued the universities (and other state programs) by raising hundreds of millions of dollars in taxes in June 1986 does not *prove* budgetary concerns in April 1986 (against creating a *new* tenure-track professorship) pretextuous. See, e.g., La. Acts 1986, H.C.R. No. 55 [p. 2091], suspending the exemption of food and medicine from state sales tax: "due to the unforeseen crisis in oil and gas production and prices and the resulting drop in state revenues, the financial condition of the state is now such that the monies lost due to these exemptions are critically needed to avoid cessation of vital services ...."

employment on the basis of the job-seeker's minority race; and, conceded, one's intent is determinable from one's expressions and actions. But Freedom of Speech assures that, in this country, one may publicly express the idea, for example, that Southern University Law Center, with a student body 60% black, and for decades and still the only viable source of public legal education for most black persons in Louisiana, ought to have black law professors in large share (whether its present "slim majority," or more, or less, is also a matter for protected debate). The First Amendment would not tolerate, and § 1983 cannot reasonably be construed to be, a statute that founds personal liability, for one's *colleagues'* refusal to hire, upon the mere espousal of ideas of racial balance in a formerly black-by-"law" university.

Petitioner Harris respectfully submits that the District Judge was correct in granting him judgment n.o.v. on this ground alone: his racial balance views, not shown to be shared by nor to have caused the vote of others, did not deprive respondent of the job he sought, and caused him no injury.

## CONCLUSION AND PRAYER

Petitioners for the foregoing reasons conclude, and pray, that a writ of certiorari should issue herein to the United States Court of Appeals for the Fifth Circuit and that, after review, that Court's judgment should be reversed and that of the District Court reinstated.

Respectfully submitted,

William V. Redmann
Counsel of Record for Petitioners

# APPENDIX

Kenneth J. ARENSON,
Plaintiff-Appellant,

v.

SOUTHERN UNIVERSITY LAW CENTER, B.K. Agnihotri, and Aaron Harris,
Defendants-Appellees

No. 89-3898

United States Court of Appeals
Fifth Circuit

September 19, 1990

Appeal from the United States District Court for the Middle District of Louisiana.

Before THORNBERRY, GEE, and SMITH, Circuit Judges.

GEE, Circuit Judge:

Plaintiff Kenneth J. Arenson won a $65,000 jury verdict against Chancellor B.K. Agnihotri and Professor Aaron Harris of the Southern University Law Center for their violations of 42 United States Code §§ 1981 and 1983. The district court granted a judgment notwithstanding the verdict for the defendants. We conclude that the record contains sufficient evidence such that a reasonable jury could find for the plaintiff, and thus reverse the judgment of the district court and reinstate the jury's verdict.

*Facts*

Southern University in Louisiana was at one time required by law to be an all black institution. Today, the university population remains overwhelmingly black, but the student body at the law school is about 40% white and the law school faculty has a slim majority of black professors. The facts, read in a light most favorable to the jury's verdict, tell the story of

Mr. Arenson's attempts to be placed on the coveted "tenure track" at the Southern University Law Center ("SULC").[1]

B. K. Agnihotri, chancellor of the law center, hired Mr. Arenson, a white lawyer with no teaching experience, as a visiting assistant professor for the 1985 spring semester. Chancellor Agnihotri informed Mr. Arenson that his position was a temporary one and that he could not acquire credit toward academic tenure in a visiting professor position. In March 1985, SULC renewed Mr. Arenson's contract for the fall 1985-86 academic year and hired him to teach the 1985 summer session.

At the end of the 1985 academic year, the university terminated Professor Loretta Lyles, who had occupied a tenure track position. In September 1985, Jesse Stone, a former dean of the law school and former president of the university, returned to the faculty as a full professor. Another tenure track professor, J. Homes Armstead, did not obtain a renewal of his contract after the 1985-86 academic year. Mr. Arenson testified that in late 1985 Chancellor Agnihotri told him that he might qualify for the tenure track position opened by Professor Armstead's departure.

In the spring of 1986, the Commissioner of the Louisiana State Board of Regents wrote to the President of Southern University, informing him that the Governor of Louisiana intended to reduce the budgets of all higher education institutions by twenty percent. The president sent a copy of the letter to Chancellor Agnihotri. The law center prepared proposed budget cuts, but the reductions were never actually imposed. Evidence introduced by Mr. Arenson showed that the SULC budget actually increased each year.

In February of 1986, Mr. Arenson wrote to Professor Aaron

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[1] A tenure track teaching position is one that can lead to "tenure" after a certain number of years of teaching experience. A professor who achieves tenure cannot be removed from his position unless good cause is shown.

Harris, Chairman of the law center's Tenure and Promotion Committee, requesting that he be granted a teaching position that could lead to academic tenure. Mr. Arenson did not send a copy of this letter to Chancellor Agnihotri, but the chancellor learned of the letter several months later. Professor Harris responded in April of 1986 that he was "of the impression that it is in your [Mr. Arenson's] best interest not to present this matter to the committee at this time due to the depressed budget."

Around the time Professor Arenson made his request for a tenure track position, Evelyn Wilson, a young black lawyer, interviewed with SULC for a position as legal writing instructor at the law center.[2] The law center hired Ms. Wilson in June of 1986 to teach legal writing, at a salary significantly below that of other instructors, including that of Mr. Arenson. Chancellor Agnihotri at that time informed Ms. Wilson that her position was a tenure track position.

Mr. Arenson made a second request for a tenure track position in August of 1986. Chancellor Agnihotri became aware of Mr. Arenson's earlier request to Professor Harris at this time. A third request in September went unheeded by the Faculty Appointments Committee until the end of the month, at which time the chancellor wrote Mr. Arenson that the committee had decided to deny his request for a tenure track position and further voted not to renew his visiting position beyond the current year. Chancellor Agnihotri noted in his letter that he concurred in the committee's decision. The minutes of the committee meeting were not offered into evidence, but it is undisputed that both Chancellor Agnihotri

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[2] Admission criteria at SULC are less stringent than those of other Louisiana law schools, and legal writing was an area where many students suffered difficulty. When Ms. Wilson interviewed for the job, legal writing was being taught by Ms. Marie Augustus, who was Director of Alumni Affairs and not a member of the faculty. SULC hired Ms. Wilson after concluding that it would be beneficial to have a permanent legal writing instructor for the school.

and Professor Harris attended the meeting and were members of the committee. The evidence also established that the chancellor informed the committee prior to their vote on Mr. Arenson that no tenure track positions were available.

The record contains some evidence that Professor Harris on several occasions expressed the view that maintaining a racial balance on the faculty was desirable, including remarks that the faculty already had too many white law professors.

*Procedural History*

After learning that his contract would not be renewed, Mr. Arenson sued Southern University and three of its law faculty members under 42 U.S.C. §§ 1981 and 1983 and under Title VII, 42 U.S.C. § 2000e et seq. The district court granted the university's motion for summary judgment on grounds of eleventh amendment immunity. At the close of evidence at trial, the district court granted a directed verdict in favor of one of the faculty members, professor Donald J. Tate. The jury found against the two other defendants, Professor Harris and Chancellor Agnihotri and awarded $65,000 in damages. The court granted a judgment notwithstanding the verdict for the defendants and, as the damages findings were advisory to the Title VII equitable claims, the court dismissed all of Mr. Arenson's claims. Mr. Arenson now appeals the judgment in favor of Professor Harris and Chancellor Agnihotri.

*Standard of Review*

We apply the same standard of review as that of the district court in determining whether a directed verdict or a judgment notwithstanding the verdict is proper. *In re Letterman Bros. Energy Securities Litigation*, 799 F.2d 967, 972 (5th Cir.1986). We set forth that standard in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc):

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence--not just that evidence which supports the non-

mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

To prove an employment discrimination claim, a plaintiff must show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected, and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The burden of establishing a prima facie case, however, is "not onerous", but only requires proof that the plaintiff applied for an available position for which he was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d (1981). After the plaintiff establishes his prima facie case, "the burden shifts to the defendant . . . to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Burdine*, 450 U.S. at 254-56, 101 S.Ct. at 1094-95 (citations and footnotes omitted). In the case before us today, however, the defendants do not contend that the plaintiff was denied

tenure for a legitimate reason.[3]

We conclude that a reasonable jury could have determined that a tenure vacancy did exist but was denied to Mr. Arenson for a discriminatory purpose. The departures of Professors Armstead and Lyles, together with the offer of tenure to Ms. Wilson--who had less experience than Mr. Arenson--and Professor Harris's comments about the need to maintain a black majority on the faculty provide some evidence that tenured positions were available to black applicants but not to Mr. Arenson. The jury was entitled to weigh Chancellor Agnihotri's testimony about budgetary concerns against the evidence offered by Mr. Arenson that the law center's budget actually increased during the time when he made his several requests for tenure. The defendants offered little evidence from which the jury could infer that a legitimate reason existed for denying Mr. Arenson a tenure track position, but some evidence existed that the defendants denied him the position for a discriminatory purpose. In close cases such as the one we decide today, we must allow the jury's determination of the facts to stand. We hold that the record contains enough evidence to support the jury's verdict and therefore reverse the judgment of the trial court.

REVERSED.

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[3] The record contains student testimony offered by the plaintiff that Mr. Arenson was an "excellent teacher." The defendants make no serious effort to rebut this, save for testimony by Professor Harris as to Mr. Arenson's "quirky" behavior.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KENNETH J. Arenson — CIVIL ACTION

VERSUS

SOUTHERN UNIVERSITY LAW CENTER
ET AL — No. 87-209-A

RULING ON MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT AND
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action involves claims of racial discrimination by a white visiting assistant professor of law against several faculty members and Southern University brought under 42 U.S.C. §§ 1981 and 1983 and Title VII, 42 U.S.C. § 2000(e).

The matter is before the court upon a motion by defendants for judgment notwithstanding the verdict or in the alternative for a new trial. The original defendants were Southern University Law Center, Chancellor B. K. Agnihotri, a native of India, Aaron Harris, a black professor of law, and by amended complaint, Donald J. Tate, a white professor of law. The university's claim of Eleventh Amendment immunity was granted and the §§ 1981 and 1983 claims against it were dismissed prior to trial. Plaintiff's claims under 42 U.S.C. §§ 1981 and 1983 against Chancellor Agnihotri, Professor Harris and Professor Tate were tried to a jury. A directed verdict was granted on behalf of Professor Tate and the jury found against Chancellor Agnihotri and Professor Harris in favor of plaintiff in the amount of $65,000. The jury's findings are considered advisory as to the Title VII claims.

The court has carefully considered the matter and concludes that the verdict against Chancellor Agnihotri and Professor Harris must be set aside and that judgment must be rendered in favor of all the defendants on all the claims.

Many of the facts are essentially undisputed. Viewed in the

light most favorable to plaintiff, the evidence establishes the following:

Southern University was at one time all black and so specified by law; it remains an overwhelmingly black institution but the student body of the Law Center is forty percent white and the faculty of the Law Center is majority black, although not overwhelmingly so.

Plaintiff, a white male lawyer with no teaching experience, was engaged by Chancellor Agnihotri as a visiting professor for the 1985 spring semester at the law school and he went to work in January, 1985. It was made plain to Mr. Arenson that his was a temporary position and that he could not acquire academic tenure in that position.

In March, 1985, Chancellor Agnihotri informed plaintiff that his contract had been renewed for the fall 1985-86 academic year and that he was also engaged to teach the summer school of 1985.

In September 1985, Professor Jesse Stone, former Dean of the Law School, and former President of the University, returned to the faculty as a full professor. That placement was by virtue of a court order.

In the fall of 1984, J. Holmes Armstead, a black lawyer with some prior teaching experience, was hired as an associate professor at the law school. That position was apparently a "tenure-track" position. At the end of the first year, Armstead was informed that his contract would not be renewed after the 1985-86 academic year.

On February 6, 1986, the Commissioner of the Louisiana State Board of Regents wrote to the President of the Southern University System informing him that the Governor of Louisiana intended to reduce budgets for all higher education institutions by some twenty percent on July 1, 1986. On February 12, 1986, the president sent a copy of that communication to the Chancellor of the Law Center.

Proposed budgets with reductions of twenty and twenty-two percent respectively were prepared, although it later turned out that the reductions were not actually imposed.

On February 14, 1986, plaintiff wrote to Professor Aaron Harris, who was Chairman of the Law Center's Tenure and Promotion Committee, requesting that he be granted a teaching position which could lead to academic tenure--referred to as a "tenure-track position." Plaintiff did not send a copy of that communication to Chancellor Agnihotri and Chancellor Agnihotri was unaware of the communication until much later. Professor Harris is one of the most senior members of the law school faculty.

On April 25, 1986, Professor Harris answered plaintiff's request, stating "I am of the opinion that it is in your best interest not to present this matter to the Committee at this time due to the depressed budget."

At some time before April, 1986, Evelyn Wilson, a young black female lawyer who had served as a law clerk for the Chief Justice of the Louisiana Supreme Court, was interviewed for a position as legal writing instructor at the law center. Admission standards at Southern University Law Center are not nearly as strict as most other law schools and the teaching of legal writing has long been a problem at that institution. At the time Ms. Wilson was interviewed, legal writing was being taught by a Ms. Marie Augustus who was Director of Alumni Affairs, and not a member of the faculty. When Ms. Augustus assumed the position of Director of Placement, she ceased teaching legal writing. Ms. Wilson was offered a tenure-track position in an attempt to obtain a permanent legal writing instructor for the institution. Her salary was significantly below that of other instructors at the law school, including that of plaintiff. Ms. Wilson was engaged in June, 1986, and went to work in August, 1986.

On August 25, 1986, plaintiff wrote to Chancellor Agnihotri enclosing a copy of his February letter to Professor Harris

stating, "I now wish to resubmit that letter with a request that I be elevated to the level of an Associate Professor and also that I be considered for tenure at this time." That was Chancellor Agnihotri's first knowledge of plaintiff's February request to Professor Harris. On that same date, the chancellor forwarded plaintiff's letter to Professor Harris.

On September 16, 1986, plaintiff made a second request to the chancellor stating:

> As I'm sure you will recall from our conversation of last April, you stated that the only problem with placing me in a tenure-track position was that it would involve creating a whole new tenure-track slot simply to accommodate me which, under the then existing budgetary conditions, was not feasible. I would appreciate a written response from you concerning the availability of tenure-track positions since our conversation last April, now, and in the immediate future. Without further clarification of your position of last April, it is impossible for me to make the requisite plans for my future.

On September 29, 1986, the chancellor informed plaintiff that his request had been considered by the Faculty Appointments Committee and that "... it was the Committee's decision to deny your request and I concur in this decision." That letter also informed plaintiff that his visiting position would not be extended beyond the 1986-87 academic year.

Despite the assertion of counsel for plaintiff in brief, the minutes of that committee meeting were not offered or received in evidence although the document was apparently marked as Exhibit P-53. The undisputed evidence, however, establishes that Chancellor Agnihotri is Chairman of the Faculty Appointments Committee and that Professor Harris is a member of the committee.

The evidence also clearly establishes that Chancellor Agnihotri informed the committee that no tenure-track positions were then available and that the committee voted

unanimously to deny plaintiff's request for such a position. The committee then voted that plaintiff's visiting position would not be extended beyond the current academic year. The evidence is clear that the vote was not unanimous as to extension of his contract, although the actual vote of each member is not in evidence. Chancellor Agnihotri did not vote on either proposition.

There is some evidence that Professor Harris on some occasions has expressed the view that Southern University Law School has a unique mission to help black law students and that he has expressed views on the desirability of maintaining a racial balance on the faculty, including some remarks to the effect that there were already too many white tenured law professors.

The record is completely devoid of any evidence, direct or circumstantial, that would suggest that Chancellor Agnihotri, a native of India, was motivated by racial concerns in any of his actions involving plaintiff and his sojourn at the law school.

A motion for judgment notwithstanding the verdict should be granted only if the non-moving party has failed to present "substantial evidence ... of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." Argubright v. Beech Aircraft Corp., 868 F.2d 765 (5th Cir. 1989), citing Boeing Co. v. Shipman, 4112 F.2d 365, 374 (5th Cir. 1969) (en banc). The court is required to draw all reasonable inferences in favor of the non-movant, but must also consider all of the evidence rather than just the evidence favorable to the non-movant. "A scintilla of the evidence" is insufficient to create a jury question. Id. A motion for J.N.O.V. cannot be based upon grounds not included in a prior motion for directed verdict.[1] Kuehne & Nagel v. Geosource, Inc., 874 F.2d 283

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[1] Defendants presented their arguments as to the sufficiency of the evidence at the close of plaintiff's case and their motion for directed verdict was renewed at the end of the trial. They now present arguments based upon the

(5th Cir. 1989).

Plaintiff essentially claims two acts of racial discrimination: the first was in failing to grant him a tenure-track appointment and the second was in failing to extend his contract beyond the 1986-87 academic year.

As to the first alleged act of discrimination, the evidence clearly shows that the Appointments Committee unanimously voted to deny plaintiff's request for tenure-track position because the chancellor informed the committee that there were no tenure track positions available. Plaintiff attempted to prove that the chancellor somehow misinformed the committee through evidence relating to the tenure-track position given Ms. Wilson and an opening purportedly created by the departure of Mr. Armstead.

Drawing reasonable inferences in plaintiff's favor, the court finds that plaintiff failed to present substantial evidence to prove that Chancellor Agnihotri actually did misinform the committee. While Mr. Armstead did leave the law school at the conclusion of the 1985-86 school year, it is plain that because of a court order the law school had rehired Professor Stone and Armstead was effectively replaced in advance of his leaving.[2] As to Ms. Wilson's position, it is clear that she was offered and accepted this position in June 1986, prior to the committee vote. It was also evident that plaintiff would not have accepted the position of legal writing instructor had it been offered him.

Moreover, even if there was sufficient evidence for the jury to conclude that Chancellor Agnihotri misinformed the commit-

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1981 Consent Decree which were not included in their motion for directed verdict. Those arguments will not be considered.

[2] The evidence is very clear that plaintiff was aware that no such position then existed as he pointed out in his letter of September 16 that the chancellor had already told him that placing him in such a position would involve creating a slot solely to accommodate him.

tee, there was insufficient evidence for the jury to conclude that he misinformed the committee because of plaintiff's race. There was no evidence that the chancellor held similar racial views regarding the composition of the faculty as Professor Harris allegedly did. Nor was there any evidence to support plaintiff's claims that the two conspired. It was precisely for that reason that the court granted defendants' motion for directed verdict on the conspiracy claim.

As to Professor Harris, there was no evidence to support a finding that he caused plaintiff's request for a tenure-track position to be denied. It was undisputed that the committee voted against plaintiff's request because the chancellor informed them that there was no tenure-track position available. Under these circumstances, whatever racial views Professor Harris held regarding plaintiff's race, he could not have caused plaintiff any damages because the committee would have taken the same action in any event.

As to plaintiff's second claim, failure to extend his temporary teaching position, there is likewise insufficient evidence to support it. As to Chancellor Agnihotri, there was no evidence that he took any action relative to the application for renewal of plaintiff's contract. Plaintiff insists that Professor Harris was an "influential" member of the faculty Appointments Committee. Plaintiff then postulates that because of the various comments Professor Harris is alleged to have made over the years, that he, out of racial animosity, influenced others on the committee to vote against plaintiff. There is no evidence to support that postulation. Plaintiff did not even offer in evidence the actual minutes of the committee to show how each member voted and no member of the committee testified that Professor Harris influenced his vote. All of the committee members who testified denied that race played any part in the vote of the committee. At best, plaintiff has proved that because of his expressed racial views concerning the institution, Professor Harris voted against extending his temporary teaching position. Professor Harris is

only one member of the committee and there is a total failure of proof that would support any jury finding that Professor Harris influenced the other members of the committee to vote against plaintiff for the same reason.

The court erred in failing to grant the motion for directed verdict at the end of plaintiff's case and again at the close of all the evidence. That error is herewith corrected. The motion for judgment notwithstanding the verdict is hereby GRANTED as to the § 1981 and § 1983 claims.

As to the Title VII claims, the court hereby adopts the facts recited above and the discussion of the law as findings of fact and conclusions of law.

There will be judgment in favor of all defendants and against plaintiff and this action will be dismissed.

Baton Rouge, Louisiana, November 24, 1989.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

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[District Court caption as on A-7 not repeated]

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that there be judgment entered herein in favor of defendants, Southern University, Chancellor B. K. Agnihotri, Aaron Harris and Donald Tate, and against plaintiff, Kenneth J. Arenson, dismissing plaintiff's suit at plaintiff's costs.

Baton Rouge, Louisiana, December 5, 1989.

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3898

KENNETH J. ARENSON,

Plaintiff-Appellant,

versus

SOUTHERN UNIVERSITY LAW CENTER,
B.K. AGNIHOTRI, AARON HARRIS,

Defendants-Appellees

Appeal from
the United States District Court
for the Middle District of Louisiana.

ON PETITION FOR REHEARING
(November 21, 1990)

Before THORNBERRY, GEE, and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Thomas Gibbs Gee
United States Circuit Judge